ary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly."

In Re Soo Leot,[4] Buhagiar J. following the principles laid down by Jenkins C.J. in *Emperor* v. *Lachiram, supra,* held that "the powers of the High Court in revision are exercisable at the discretion of the court and that discretion is untrammelled and free, so as to be fairly exercised according to the exigencies of each case."

Questions in issue

In the instant case, the short issue that arises is whether the learned Judge had exercised the power of revision within the limits and in the spirit of the provisions of the Code which relate to the sentence of whipping. The Code clearly prohibits whipping to be executed in instalments. Thus, by imposing additional strokes after a sentence of whipping by a lower court had already been executed, it necessarily means that such strokes shall have to be further executed. Indeed, the whipping shall have to be inflicted on two separate occasions and therefore in two instalments. In such a case, it is clearly improper for a Judge to exercise his revisionary power to impose additional strokes. He would under those circumstances be acting contrary to law.

At this point we wish to observe that a Judge may use the power of revision to increase a sentence only in exceptional cases. He is not to assume the role of a Public Prosecutor. The law is clear in that the Public Prosecutor is vested with a right to appeal against any sentence which he feels is manifestly inadequate. The power of revision is therefore to be used sparingly and should remain a discretionary power to be exercised primarily for purposes of correcting a miscarriage of justice. (See the observation of Hepworth J. in *Re Radha Krishna Naidu*).[5].

Coming back to the question in issue, the answer to the first question is therefore in the negative. In the light of our answer to this question, we accordingly quash the additional whipping imposed by the learned Judge on each of the applicants.

With respect to the second question, we do not propose to answer it. The record does not show that the applicants had applied for an adjournment to engage a counsel. Be that as it may, we wish to observe that there is adequate protection for the accused in such matter as evident by sub-section (ii) of section 325 of the Code. Section 325(ii) states that –

> "No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard, either personally or by advocate, in his own defence."

The above protection is further reinforced by the proviso to section 36 of the Courts of Judicature Act, 1964 which prohibits a final order from being made "to the prejudice of any person unless the person has had an opportunity of being so heard."

In this regard, it is also useful to bear in mind the provision of section 255 of the Code which confers a right on every person accused before any criminal court to be defended by an advocate.

All these provisions are, in our view, consistent with the fundamental liberty as enshrined in the Constitution that a person arrested be allowed to consult and be defended by a legal practitioner of his choice (Federal Constitution Article 5(3)).

Thus, subject to certain legal restrictions, a prisoner should he afforded an opportunity of access to proper legal advice without which the interest of justice would clearly be defeated.

Order accordingly.

Solicitors: *Ngeow & Maurice Gomes.*

KEHAR SINGH v. STANDARD CHARTERED BANK

[S.C. (Salleh Abas L.P., Syed Agil Barakbah & Wan Hamzah S.C. JJ.) May 15 & November 25, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 428 of 1985]

Banking – Payment of money to bank to purchase a bankdraft – Whether possession of money had passed to cashier of bank – Money in partially open trough stolen – Whether cashier and bank negligent – Negligence of customer – Loss equally apportioned.

On September 8, 1982 the appellant and his wife went to the respondent bank at Kelang to buy Sterling bank draft for £2,200 to be sent to their son in England. They went first to the foreign exchange counter, filled in an application form and handed it to the clerk in charge who subsequently filled in the equivalent amount in Malaysian

Ringgit, which was $8,989.25. The clerk signed the form and handed it back to the appellant with instruction to give the form and pay the money to the cashier. He then went to the cashier's counter and deposited the form together with the money in the cashier's trough.

The cashier's counter is not an open counter but a closed one in which there is a transparent screen separating the cashier from the customer. Below the screen is the trough which has a lid, which can only be closed partially, either on customer's side or on the cashier's side for the purpose of handing and receiving money. According to the practice of the respondent bank the trough would be opened on the customer's side when the cashier is ready to receive the money and this side would be closed when the cashier is not ready to take it.

At the time when the appellant and his wife went to the cashier's counter, the customer's side of the trough was partially open and the cashier was engaged in counting money of the previous customer whom she had already dealt with. The appellant's wife placed the form and the money $8,989.25 in the trough and while both were waiting to be served, a stranger came to them and directed their attention to a $10/– note lying on the floor. After the couple had bent down to pick up the $10/– note they noticed that the money which had been placed earlier in the trough had gone and the stranger had disappeared.

The appellants sued for recovery of $8,989.25 but the respondent bank denied liability. The learned Magistrate gave judgment in favour of the appellant on the ground that the bank was negligent but on appeal to the High Court, it was held that the respondent bank was not negligent and the decision was reversed. Leave was granted to appeal to the Supreme Court.

Held (Salleh Abas L.P. dissenting), allowing the appeal: both the respondent bank and the appellant was equally negligent. The bank's negligence was the failure of the cashier to attend to the appellant's needs when the trough at that time was opened on the appellant's side, though partially. The appellant's negligence consisted of putting the money in the trough when the cashier was not ready to attend to them and thereafter failing to ensure the safety of the money. The loss should therefore be equally apportioned.

SUPREME COURT.

C.V. Das (*Charanjit Singh Saini* with him) for the appellant.

Robert Lazar for the respondent.

Cur. Adv. Vult.

Salleh Abas L.P.: This is another appeal which originated from the Magistrates' Court.

On September 8, 1982 the appellant and his wife went to the respondent bank at Kelang to buy a Sterling bank draft for £2,200 to be sent to their son in England. They went first to the foreign exchange counter, filled in an application form and handed it to the clerk in charge who subsequently filled in the equivalent amount in Malaysian Ringgit, which was $8,989.25. The clerk signed the form and handed it back to the appellant with instruction to give the form and pay the money to the cashier. He then went to the cashier's counter and deposited the form together with the money in the cashier's trough.

The cashier's counter is not an open counter but a closed one in which there is a transparent screen separating the cashier from the customer. Below the screen is the trough which has a lid, which can only be closed partially; either on customer's side or on the cashier's side for the purpose of handing and receiving money. According to the practice of the respondent bank the trough would be opened on the customer's side when the cashier is ready to receive the money and this side would be closed when the cashier is not ready to take it.

At the time when the appellant and his wife went to the cashier's counter, the customer's side of the trough was partially open and the cashier was engaged in counting money of the previous customer whom she had already dealt with. The appellant's wife placed the form and money $8,989.25 in the trough and while both were waiting to be served, a stranger came to them and directed their attention to a $10/– note lying on the floor. After the couple had bent down to pick up the $10/– note they noticed that the money which had been placed earlier in the trough had gone and the stranger had disappeared.

When sued for the recovery of $8,989.25 the respondent bank denied liability. The learned magistrate gave judgment in favour of the appellant on the ground that the bank was negligent, but on appeal to the High Court, Harun J. reversed the decision holding that the respondent bank was not liable but he gave no reason for this opinion. On leave being granted the matter came before us.

There were two issues raised in this appeal. First, whether possession of the money had already passed to the cashier and therefore to the respondent bank. Secondly, if so whether the cashier and therefore the bank was negligent.

After listening to the submissions of both counsel, we came to two different opinions. The majority opinion (Syed Agil Barakbah and Wan Hamzah S.C.JJ.) is that both the appellant and the respondent bank were guilty of negligence. The

appellant's negligence consisted of putting the money in the trough when the cashier was not ready to attend to them whilst the bank's negligence was the failure of the cashier to attend to the appellant's need when the trough was at that time opened on the appellant's side, though partially. In their judgment the loss should equally be apportioned and the appeal should therefore be allowed.

With respect, I wish to differ from their opinion. In my view the case should be decided on the question whether or not possession of the money had already passed from the appellant to the cashier. If the trough was closed on the customer's side so that the appellant had to push the lid in order to put in the money there can be no doubt that possession thereof could not have passed from the appellant to the respondent bank. But, as has been disclosed in this case, the appellant put in the money when the trough was partially open on this side, *i.e.* customer's side. Since the trough, according to the practice of the bank must be closed if the cashier is not ready to receive the money by leaving it open, though partially, the respondent bank must be regarded as telling the customers that they are ready to receive the money and inviting them to place the same in it, and therefore the appellant is entitled to do so. That being the case possession of the money must in my view pass to the respondent bank the moment the money was placed in the trough. Now, since it was stolen whilst it was in their possession they must be responsible, as they owe a duty of care towards their customers. It makes no difference whether the cashier who was busy counting other money was aware or unaware of the fact that the appellant had placed the money in it, because what constitutes the respondent bank's negligence is the fact they allowed the customer's side of the trough to remain open, though partially and to let the money to remain in it without being attended to. No explanation at all was forthcoming from them why it was left partially opened. The finding of the learned magistrate on this fact is clear and uncontroverted.

If the possession of money had not passed to the respondent bank I could not see how duty of care on their part could arise. In such situation the loss should be borne by the customer, as he should be responsible for the safety of his money. But that is not what happened in the present case.

I therefore would allow the appeal of the appellant in toto as I cannot see how he can be held to be negligent at all.

However since the majority view prevails, the appeal was allowed to the extent that the appellant could recover half of the amount claimed. He is also entitled to the costs both here and in the court below and the deposit should be refunded to him.

Syed Agil Barakbah and Wan Hamzah S.C.JJ. (majority judgment): We have the advantage of reading the grounds of judgment of the learned Lord President who presided at the hearing of this appeal. The Lord President held that the respondent bank were guilty of negligence. However, we held that both the appellant and the respondent bank were equally guilty of negligence.

The relevant facts of this appeal are clearly set out in the Lord President's grounds of judgment and we need not repeat them. Two issues were raised in this appeal, *viz.* whether possession of the money had already passed to the cashier of the respondent bank and, if so, whether the cashier and the bank were negligent. As regards the first issue, considering the facts and surrounding circumstances of the case, we are of the view that two steps are necessary in order to pass possession of the money from the appellant to the respondent bank. According to the bank procedure, when the cashier was ready to attend to a customer, she would pull the lid to her side, leaving the trough on the customer's side open. That acted as an invitation to the customer to put in his money into the trough. When that was done, the cashier would push the lid forward to close the trough on the customer's side indicating that she had accepted the money. It is our view in the circumstances therefore that possession of the money would pass to the cashier and therefore to the respondent bank as soon as the cashier pushed forward the lid, thereby closing the opening on the customer's side and opening the one on her side. Apart from the above, there is another relevant factor which should not be ignored, *i.e.* the transparent screen separating the cashier from the customer enabled both to see each other and to communicate with each other.

In the present appeal, after the appellant and his wife had obtained a completed form to purchase a Sterling bank draft for £2,200/– to be sent to their son in England, they went as instructed to the cashier's counter and deposited the form together with the money in the cashier's trough. At that time, the customer's side was partially open but the cashier was engaged in counting money of a previous customer. The customer had for some reason or other left the

place but she was still counting. The appellant could see the cashier busy at work through the transparent screen and she had not indicated that she was ready to attend to him. However, the trough on the customer's side was partially open so the appellant put in the form and money in the trough. Both he and his wife were still waiting for the cashier to attend to them. It was at that stage that someone drew their attention to a $10/- note lying on the floor. After the appellant had bent down to pick it up, both he and his wife discovered that the money which had been placed earlier in the trough was missing and the stranger had disappeared.

Our considered opinion is that both the respondent bank and the appellant were equally negligent. The bank's negligence was the failure of the cashier to close the lid on the customer's side of the trough fully whilst still attending to the needs of an earlier customer. She had carelessly left it partially open, thereby indicating according to the procedure an invitation to the appellant to put in the money. The appellant's negligence was that he put the money in the trough which was partially open when he could see through the screen that the cashier was still not ready to attend to his need and thereafter failed to ensure the safety of the money. As stated earlier, possession of the money, in our view, had not passed to the bank because the cashier had not pushed the lid forward to close the customer's side. It is most unfortunate that the appellant had lost the money in the trough by an unexpected event of theft after his attention was distracted from the large amount of money in the trough to a mere $10/- note on the floor. In our judgment, the loss should equally be apportioned between the respondent bank and the appellant, and the appeal should be allowed on that basis. The appellant is entitled to costs both here and in the Court below and the deposit be refunded to him.

Order accordingly.

Solicitors: *Farid Ariffin & Associates; Shearn Delamore & Co.*

TENGKU HAJI JAAFAR IBNI ALMARHUM TENGKU MUDA ALI & ANOR. v. GOVERNMENT OF PAHANG

[S.C. (Salleh Abas L.P., Hashim Yeop A. Sani & Syed Agil Barakbah S.C.JJ.) December 4, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 376 of 1985]

Islamic Law – Gift – Concession by former Sultan of Pahang – Constituent elements to constitute valid gift – Gift never perfected or consummated by the taking of possession – Description of land – Concession not recognised by State Government nor registered – Failure of donees to take possession – State land – Limitation – Pahang Land Regulations, 1889 – Land Enactment, 1903 – Registration of Titles Enactment, 1911.

Pahang – Historical perspective – Land Administration in Pahang – Application of Islamic Law.

On January 19, 1888, corresponding to 6th Jamadil Awal 1305, the Sultan of Pahang by a document bearing the same date made a gift *inter vivos* of a large tract of land described as "all that river district being the basin of Sungei Tembeling and all the tributaries from their sources to their mouths and situate in the State of Pahang" to his daughters Tengku Long and Tengku Dalam. The first appellant is the son of Tengku Long, whilst the second appellant is her grandson being the son of the first appellant. Both appellants claimed that they are lawfully entitled to the land described in the said royal document, which they maintained to be a valid document of title and still subsisting. They filed a suit in the High Court asking for a declaration to that effect. The respondents denied the gift and any knowledge of it and in their application to strike out the suit they alleged *inter alia* (a) the statement of claim does not disclose any reasonable cause of action and (b) the suit is statute barred. L.C. Vohrah J. who heard the application held that there was a reasonable cause of action but the suit was caught by the Statute of Limitation. The appellants appealed.

Held, dismissing the appeal: (1) the gift of land in this case was made by the Sultan almost two years before the 1889 Land Regulations and there can be no doubt that the land law applicable to this gift was the Shariah or Islamic law;

(2) in order to constitute a valid gift under Islamic Law there must be three constituent elements namely (i) a manifestation of the wish of the donor to give; (ii) the acceptance of the donee either impliedly or expressly; and (iii) the taking of possession of the subject matter of the gift by the donee, either actually or constructively;

(3) in this case while the first two elements of a valid gift, that is, offer and acceptance, are established, there is nothing to show in the statement of claim that the donees had ever taken possession of the gift land at all either actually or constructively. Hence the gift failed because it was never perfected or consummated by the taking of possession;

(4) the subject-matter of the gift in this case was ill-defined and vaguely described without any proper delienation and only by occupation or taking possession of the